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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1964

No. 1021

HANEY MIMS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Haney Mims, respectfully prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit.

OPINION OF THE COURT BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 340 F. 2d 851 (Appendix I, infra).

JURISDICTION.

The decision of the United States Court of Appeals for the Seventh Circuit was entered on February 2, 1965.

A timely petition for rehearing was filed. The court denied the petition for rehearing on February 26, 1965. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED.

1. Whether the standard of proof beyond a reasonable doubt is met in a so-called "controlled sale" of narcotics to an informant and what standards are required to make it a controlled sale in fact.

2. Whether the standard of proof beyond a reasonable doubt has been met when the record is silent as to a critical fact, from which the ultimate inference must be drawn in order to establish the guilt of the defendant.

3. Whether it can be said that a defendant has had a fair trial, where the trial court ordered stricken all of the material evidence as to a certain count of an indictment and then later finds the defendant guilty on that count and where the prosecutor introduced prejudicial testimony and exhibits when he knew, or should have known, there was no evidence available to connect the defendant to the said prejudicial evidence.

4. Whether the Court of Appeals should have expressly reversed the conviction of petitioner on Counts I, II and VII.

CONSTITUTIONAL PROVISIONS INVOLVED.

The Fifth Amendment to the Constitution of the United States provides in pertinent part that,

> "No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *"

STATEMENT OF THE CASE.

On February 11, 1964, an indictment (Printed Appendix filed below p. 5, hereinafter abbreviated as App.) was filed in the District Court. Count I of said indictment charged that on or about September 12, 1963, at Chicago, Illinois, in the Northern District of Illinois, Eastern Division, the petitioner did "unlawfully, wilfully and knowingly sell approximately 4.35 grams of heroin, a narcotic drug, to Joseph Alphonso Branch" in violation of Title 26, Section 4705(a), United States Code, as amended by the Narcotic Control Act of 1956.

Count II charged that on or about September 12, 1963, at Chicago, Illinois, in the Northern District of Illinois, Eastern Division, the petitioner also violated Title 21, Section 174, United States Code, as amended by the Narcotic Control Act of 1956 by knowingly receiving, concealing, buying, selling, and facilitating the transportation, concealment and sale of the same heroin alleged to have been sold in Count I of the indictment.

Count III of the indictment charged that on or about September 16, 1963, at Chicago, Illinois, in the Northern District of Illinois, Eastern Division, petitioner sold 10.908 grams of heroin to the said Joseph Alphonso Branch, again in violation of Title 26, Section 4705(a), United States Code, as amended by the Narcotic Control Act of 1956.

Count IV charged that on or about September 16, 1963, at Chicago, Illinois, in the Northern District of Illinois, Section 174, United States Code, as amended by the Narcotic Control Act of 1956, by knowingly receiving, con-

cealing, buying, selling, and facilitating the transportation, concealment and sale of the same 10.908 grams of heroin alleged to have been sold to Joseph Alphonso Branch in Count III of the indictment.

Count V charged another sale of 22.31 grams of heroin to the same Joseph Alphonso Branch on or about September 26, 1963, at Chicago, Illinois, in the Northern District of Illinois, Eastern Division, again in violation of Title 26, Section 4705(a), United States Code, as amended by the Narcotic Control Act of 1956.

Count VI charged that on or about September 26, 1963, petitioner violated Title 21, Section 174, United States Code, as amended by the Narcotic Control Act of 1956, by knowingly receiving, concealing, buying, selling and facilitating the transportation, concealment and sale of the same 22.31 grams of heroin alleged to have been sold in Count V.

Count VII charged that on or about December 2, 1963, at Chicago, Illinois, in the Northern District of Illinois, Eastern Division, petitioner knowingly received, concealed, bought, sold, and facilitated the transportation, concealment and sale of approximately 30 miligrams of heroin, in violation of Title 21, Section 174, United States Code, as amended by the Narcotic Control Act of 1956.

The Government called six witnesses. In addition, the parties stipulated to the testimony of the Government Chemist (App. 13) with certain reservations (App. 137, 410). The only direct testimonial evidence against petitioner came from Joseph Alphonso Branch (App. 26, 32), a convicted murderer who had committed an offense against the Narcotic Control Act while on parole just prior to his becoming an informant for the Federal Nar-

cotics Bureau, and said witness was on parole at the time he gave his testimony in the trial court herein (App. 26). The other testimony came from four narcotic agents and a Chicago police officer and was merely circumstantial evidence which related to their contact with the informer Branch and their surveillance of the meetings between Branch and Mims and other independent conduct of the petitioner, Mims.

The basic structure of the Government's case was that the informant Branch received funds from the narcotic agents on the dates alleged in Counts I through VI of the indictment; that Branch was searched and found to be allegedly free of narcotics and then sent out under surveillance to make the contact with petitioner; and that the contact was made and the informant Branch returned without money and with narcotics which he turned over to the agents.

There are, however, two distinct "holes" in the Government's web of evidence. First of all, it is clearly shown that the informant was not kept under surveillance at all times. For example, Branch testified that on September 12, 1963, he went to the Creole Restaurant, did not see Mims, and he went into the men's restroom (App. 27). There is no evidence of any surveillance on this convicted felon in the men's restroom of the Creole Restaurant. Further, there is no direct evidence in the record to show that the informant had no contact with anyone other than the agents and the petitioner on each of the dates in question.

Branch testified that he owed Mims some money. He was in doubt as to the balance, and instead of decreasing after a payment it increased or remained the same (App.

26, 27, 29, 30, 39, 42). Further, Branch testified that there was no discussion about the price of the heroin in his phone conversations with the defendant of September 11 and 12, 1963 (App. 38). On cross examination Branch became very certain that the sale which is the subject matter of Counts V and VI of the indictment that was alleged to have transpired on September 26, 1963, in fact, took place on September 27, 1963 (App. 49-51), but he was not sure of the date after being led by the prosecutor on redirect examination (App. 62). Branch further testified that the agents did not know he had been doing business with Mims until he told them (App. 59). An examination of the testimony given by this man, Branch, who fingered the petitioner, reveals it to be replete with misstatements, lapses of memory, and plain contradictions (App. 26-62).

The testimony of the Government witness, Willis M. Cola, a Chicago police officer specially assigned to the Narcotics Bureau (App. 63-72), concerned itself primarily with the surveillance of the informant, Branch, on September 12, 1963, and also on September 16, 1963.

On September 12, 1963, and on September 16, 1963, he did not keep Branch in his sight at all times (App. 64, 65, 67, 70, 71).

Louis M. Gibson, an agent of the Federal Bureau of Narcotics, testified (App. 72-85) in substance that he was at the Bureau office on September 12, 1963, then went to the Creole Restaurant where he saw Mims eating breakfast; that he went out and made a phone call to the Bureau office and was told that Mr. Branch was en route to the restaurant. He further testified that he later saw Branch walking west with Officer Cola on 79th,

that he walked back to the restaurant with Branch where he didn't see Mr. Mims and that he pointed to the men's restroom and sat down in the booth (App. 73). He testified that Mr. Branch walked in the men's room and that was the last he saw of him for that time (App. 73).

He further testified that on September 16, 1963, he saw Branch in the Bureau offices and that Branch was given $375 by Agent Azzam. He further testified that he drove Branch to the Pink Lady Lounge and that Branch went in and he went and parked his car (App. 74). He further testified that about two minutes later Branch and Mims came out of the lounge and he saw Mr. Branch hand Mr. Mims a package of money, that they walked down the street toward 79th Street and that Agent Gibson went and got back in his vehicle and observed Branch through the rear window as they walked South on Indiana. He testified further that he saw Branch bend down and pick up a package (App. 75), and that after separating from Mr. Mims walked directly back to his car. He further testified that he drove Branch to a pre-arranged meeting place where he was again searched and that the package was turned over to Agent Azzam by the witness in the same condition that he got it from the informant Branch (App. 75).

William H. Turnbou, an agent of the Federal Bureau of Narcotics, testified basically that he was in the office of the Federal Bureau of Narcotics on September 26, 1963 (App. 85), where he saw Branch make a telephone call and later receive $340 from Agent Azzam (App. 86) and later be driven by the witness to 78th and State Street where he saw Branch meet Mims (App. 86). He further testified that after that meeting Branch returned to his vehicle and later returned the $340 to Agent Azzam (App. 86). He further

testified that later that day at approximately 8 p.m., he had an occasion to be in the office of the Federal Bureau of Narcotics where he saw Branch make a telephone call and that later Branch received another $340 at about 9:30 and was later taken by the witness in his vehicle to 79th and Michigan (App. 87). He further testified that he exited the vehicle and followed Branch to the tavern where Branch went inside the tavern for a minute and then walked outside. The witness testified further that after he crossed to the south side of 79th and Prairie he later saw Mr. Mims walking toward 79th Street from the south on the west side of Prairie Avenue. He testified he observed Mims drop a brown package against the building on the sidewalk (App. 87). He did not testify, however, that he gave the package a close examination. He testified that later the defendant continued walking across 79th Street where he met Branch walking west on 79th Street and that the defendant called to Branch. He further testified that he saw the defendant drop the package and that the package was picked up by Branch and that Branch then handed the defendant some money (App. 88).

Turnbou further testified that after the passing of the money and package had occurred, he followed the informant as he walked north on Michigan to approximately 77th Street then west on 77th to State Street and then north on State Street to about 76th Street. He testified at this point he stopped his car and Branch got in. He further testified he was handed a brown package by Branch and that he at that time searched Branch and found no money or narcotics on his person. He testified that he gave the package to Agent Halpin in the same condition as he received it from Branch (App. 88).

Robert James Russo, an agent of the Federal Bureau of Narcotics, also testified on behalf of the Government (App. 94-119). He testified that on September 12, 1963, he followed the defendant from his home where he saw the defendant place an object on the ground on Indiana Avenue (App. 95). He testified that he glanced down and could tell that it was a blue package, but that he did not closely examine it and walked on by in that he was more concerned about maintaining surveillance on the defendant (App. 95). He testified that he saw the defendant enter the Creole Restaurant and that he maintained a surveillance on the restaurant until he entered his vehicle with Agent Hughes and that later he saw the informant Branch approach the area. He did not testify as to anything that took place inside the restaurant. He testified that he followed after the defendant and that the informant came out of the restaurant and observed them stop at the spot where Mr. Mims had previously placed an object (App. 96). He testified that he saw Mr. Mims hand an object to Branch and that he later saw Branch take something out of his pocket and drop it toward the ground and before it reached the ground the defendant caught it. He testified further that there was a short conversation between Mr. Mims and the informant Branch, and that he maintained his surveillance of Mr. Branch for approximately five minutes until Mr. Mims boarded a vest bound bus at 79th, at which point his surveillance ended (App. 97).

He further testified that on September 16, 1963, he again went to the vicinity of the apartment of the defendant and observed certain things take place. One of the things he testified he observed was the defendant walked into the alleyway carrying a brown paper bag which he placed in the garbage can (App. 97). This testimony was later stricken from the record on motion of

the defendant (App. 138). Agent Russo further testified that he observed the defendant walk down the street and that at approximately 20 to 25 feet from 79th Street he observed him bend over and throw something on the ground (App. 98). He further testified to seeing other agents in the area and also of seeing the defendant and the informant enter the Pink Lady Lounge and later emerge. He testified that he saw Branch hand something to the defendant which appeared to be money and that they continued walking until they had reached the spot where he had seen Mims "extend his hand to the ground * * * as if to place something down there," and he testified further that at that point Mr. Branch bent over toward the ground, looking, and Mr. Mims pointed to the ground. He testified he saw Mr. Branch pick something up off the ground after which they separated and Branch got into the vehicle with Agent Gibson and left the area (App. 98, 99).

He further testified that on December 2, 1963, he participated in the arrest of the defendant in his apartment at 8212 South Prairie Avenue (App. 99). He testified in detail with respect to finding what later appeared to be narcotics in an ashcan in the alley behind the building in which the defendant maintained his apartment. However, all of this testimony was stricken on motion of defendant at the close of the Government's case (App. 138), although the United State's Attorney insisted on extracting said evidence during the course of the trial over the strenuous objection of counsel for the defendant (App. 99-103).

The witness Russo then went on to testify with respect to Government Exhibit 4 for identification (App. 104-105). Agent Russo also testified that he and his fellow agents

had subsequently discussed what they had observed go on in the Pink Lady Lounge on the 16th of September, 1963, prior to his testimony being given in the trial court (App. 116). With respect to the September 12, 1963, incident involving the "blue package," Agent Russo testified as to its color (App. 113) but further testified that in his report made out he did not include the color of the package (App. 113), although he admitted discussing the package with the other agents involved three or four days prior to giving testimony in the trial court (App. 113, 114).

Abraham L. Azzam, an agent of the Federal Bureau of Narcotics, testified for the Government also (App. 119-138). He testified basically that he observed the activities of the informant and the defendant, in part, on the occasions of September 12 and 16, 1963, however, it is apparent from his testimony that the informant, Branch, was not in his sight or hearing at all times on both occasions (App. 124). He further testified with respect to the custody of the physical evidence offered by the Government (App. 122-129).

Government's Exhibits 1, 2, 3 and 4 were offered into evidence. An objection was made by defendant as to each exhibit, and defendant's objection was sustained as to Government's Exhibit 4. Government's Exhibits 1, 2 and 3 for identification were received into evidence (App. 412-417).

After the conclusion of all the evidence there was a finding of guilty by the court (App. 141). Upon an Information being filed by the Government, the court imposed a sentence of ten years to run concurrently under all counts of the indictment (App. 141, 142).

An appeal was taken to the United States Court of Appeals for the Seventh Circuit which rendered its opinion in due course, as stated above.

REASONS FOR GRANTING WRIT.

The following are the reasons for granting the Writ of Certiorari, in the order in which the questions are presented, *supra*:

1. There is a wide divergence among the Circuits, and indeed among the district courts, as to just what standards should apply to the so-called controlled sale of narcotics to an informant in order to insure that the "proof" thereof meets the standards of proof beyond a reasonable doubt.

An often quoted case is *Panci* v. *United States*, 5 Cir., 256 F. 2d 308, which is used because of the dictum that appears at p. 312 where the Court stated:

> "The government might have made out a case if, in the ordinary way so often successfully used in informer type cases, the agents had given the informer marked or otherwise identified money, had searched him carefully before he left on his mission to insure that he had no narcotics concealed on or about him, had kept him in sight at all times so as to exclude his having obtained narcotics elsewhere, and then made the arrest to find the identified money in the possession of the defendant and the narcotics in that of the informer. Nothing of that kind was done here. Instead, the government brought and testified to its case with no more real support in the evidence for a finding of guilty then there was for the finding that a ghost had been seen in the story of the man who said, 'My friend saw a ghost eating off a plate in his house last night, and if you don't believe it, here is the plate he said he saw the ghost eating from'."

If any of the *Panci* requisites are lacking does this render the proof insufficient as a matter of law? The Fifth Circuit held again in *Gutierez* v. *United States*, 5 Cir., 314 F. 2d 334,

that incomplete surveillance by the agents caused a failure in proof and they reversed the defendant's conviction based on a controlled sale. However, the Eight Circuit in *Foster* v. *United States*, 8 Cir., 308 F. 2d 75, held that the defendant was not entitled to an instruction based in the *Panci* standards as to what the Government must show in order to convict. There the agents had not recovered any marked money from defendant. That Court said this factor would not be controlling and affirmed the defendant's conviction. In *Johnson* v. *United States*, 8 Cir., 329 F. 2d 600, the Court, to affirm the conviction, relied on what they considered the one good sale which transpired in a kitchen with the agent in a nearby closet. That court noted at p. 601 that omissions of some of the *Panci* factors are matters that go to the weight of the evidence but do not, *ipso facto*, render the Government's proof unworthy of belief as a matter of law.

In *United States* v. *Saunders*, 6 Cir., 325 F. 2d 840, the Court makes a point of the fact that the only contact the informer had was with the agents or the defendant in affirming the conviction of Gus Saunders. As to Eloise Saunders, the Court reversed, noting that the lack of recovery of money, the lack of complete surveillance, the lack of fingerprint evidence, and the lack of testimony that anything passed from her to the informant. The Court stated at p. 843: "Evidence that at most establishes no more than a choice of reasonable probabilities cannot be said to be sufficiently substantial to sustain a criminal conviction upon appeal." In that case there was no testimony from the informant.

The Fifth Amendment to the Constitution of the United States provides, "No person shall * * * be deprived of * * * liberty * * * without due process of law * * *." Obviously it is a denial of due process to convict a man on evidence that is insufficient as a matter of law. There has been no Supreme

Court case brought to petitioner's attention that deals with the sufficiency of proof of the "controlled sale." This method of enforcement of the Narcotics laws is extremely widespread. At best, a "controlled sale" presents a situation where an informant (who has every reason to frame another individual) has an opportunity to stage a meeting with someone and make it appear to be a sale, thereby obtaining his freedom at the expense of an innocent victim.

It has always been agreed by members of the bar and bench that it is far better to release 100 guilty men than to wrongfully convict one innocent man. It is with this view in mind that we urge this Court to speak out on this question and set the standards to be followed before a man can be convicted by reason of a "controlled sale."

2. In *Byrth* v. *United States*, 8 Cir., 327 F. 2d 917, 920, the Court stated: "For, * * * an ultimate inference to be valid, it must be based upon proven facts as one inference cannot be founded upon another to sustain findings proven by circumstantial evidence." The petitioner contends that the failure of the Government to prove that the informant had no contacts with anyone other than the agents and the defendant on the dates in question renders the court helpless to draw the ultimate inference in the case at bar. It is clear from the opinion of the Court of Appeals that they first *inferred* that there were no other contacts and then *inferred* that because of that "*fact*," *ergo*, the informant must have gotten the narcotics from the defendant. The burden was on the Government and they offered no proof in that regard. Further, there was no fingerprint evidence here, and there was no recovery of marked money. However, we urge this court to issue the writ, not so much for petitioner, but for the benefit of all persons who are so unfortunate as to find themselves in similar circumstances.

3. The handicap under which a defendant in a narcotics case (*any* defendant—the more respectable the defendant, the greater the onus) labors can be seen here in the fact that the trial judge found defendant guilty on a count that he had ordered all pertinent testimony stricken and had denied admission of the relevant exhibit. This is reminicent of the frontier justice quip of "We always give the defendant a fair trial before we hang him." Because of this understandable onus that the subject of narcotics creates we again urge this court to set the standards as to what quantum of proof is necessary in these cases to convict. Because, unless due process applies to all it applies to none.

4. It is urged that, even though the defendant received concurrent sentences, the Court should have expressly reversed the convictions on the counts of the indictment that required reversal. At some time in the future, it may become quite important to petitioner whether he was convicted on all counts or just two. It does not appear important now. But who can say? We respectfully request that this court adjust this matter in the process of outlining the standards to be applied to the prosecution of a defendant for an alleged "controlled sale" of narcotics.

CONCLUSION.

For the above and foregoing reasons, the petitioner prays that a Writ of Certiorari issue from this Court to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted.

ELLIS E. REID.
Attorney for Petitioner.

APPENDIX I

In The
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

SEPTEMBER TERM, 1964 — JANUARY SESSION, 1965

No. 14753

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

HANEY MIMS, also known as BIG RED,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

February 2, 1965

Before CASTLE, *Acting Chief Judge*, KILEY, *Circuit Judge*, and MERCER, *District Judge*.

CASTLE, *Acting Chief Judge*. Haney Mims, the defendant-appellant, was convicted, following a trial before the court without a jury, on a multiple count indictment charging the unlawful sale, and the unlawful receipt, concealment etc., of a narcotic drug on designated separate occasions, in violation of 26 U.S.C.A. §4705(a)

and 21 U.S.C.A. §174, respectively. He was sentenced to imprisonment for a term of ten years as a second or subsequent offender.

The main contested issue presented by the defendant's appeal concerns the sufficiency of the evidence to support the conviction.

It is well established that in resolving the issue of sufficiency of the evidence to sustain a conviction we must, at the appellate level, view the evidence and the reasonable inferences which may be drawn therefrom in the light most favorable to the government. Conflicts in the evidence are for resolution by the trier of the facts —as are determinations of credibility. *Glasser* v. *United States*, 315 U.S. 60, 80.

The sentence imposed on the defendant was a general one and the penalty does not exceed that prescribed for any one count. Consequently, if the evidence is sufficient to support a conviction on any one of the several counts to the conviction must be affirmed. *United States* v. *Cephas*, 7 Cir., 263 F. 2d 518; *Cf. United States* v. *Gibas*, 7 Cir., 300 F. 2d 836, 840-841; *United States* v. *Cioffi*, 2 Cir., 253 F. 2d 494, 496. In view of this principle we may in the instant case limit our consideration to the sufficiency of the evidence as it bears on the sales alleged to have been made by the defendant on or about September 16 and September 26, 1963. Each of these occasions represents a classic example of a so-called "controlled" purchase of narcotics by an informant kept under surveillance. The record discloses that the requirements set out in *Penci* v. *United States*, 5 Cir., 256 F. 2d 308, 312, with one exception, *i.e.*, recovery of the money, were

rigidly adhered to. On each occasion the informant was searched prior to his meeting with the defendant and found free of money or narcotics, save for a small amount of silver. The informant was then escorted to his rendezvous with the defendant by federal agents or a local police officer and the defendant was observed to point out a package which the informant picked up. The informant was observed handing money to the defendant just after or just prior to receiving the package. Immediately following each of the transactions the informant, still under surveillance, went directly to an agent of the Federal Bureau of Narcotics to whom he surrendered the package. He was then searched and found free of money except for some silver. To this was added the additional surveillance of the defendant Mims who on each occasion was observed to plant the package at the exact location to which he later led the informant, who picked it up after defendant pointed it out. The subsequent chain of custody of the packages, their condition, and the analysis which revealed the contents to be heroin was stipulated and is not contested. On the September 16th occasion there was but a momentary gap in the agent's surveillance of the informant when the informant left the agent's automobile to enter a tavern from which he then emerged with the defendant. He was then observed handing the defendant money and being escorted by the defendant to the location where the informant bent down and picked up the package.

(Opinion of the United States Court of Appeals)

Inasmuch as the defendant was not arrested until December 2, 1963, it appears of no import that he did not at that time have in his possession any of the official funds supplied the informant for the purpose of making the purchases.

The defendant contends the evidence falls short of the standard of proof beyond a reasonable doubt and is equally consistent with the defendant's innocence. He characterizes the evidence as "thinly circumstantial" apart from the testimony of the informer whose credibility he attacks. But the question of credibility was resolved by the trier of the facts and viewing the evidence in the light most favorable to the government it amply supports defendant's conviction. We are not persuaded by the contention advanced in oral argument that the government's proof is insufficient because the prosecution did not elicit from the government's surveillance witnesses express and direct testimony negating the possibility that the informant might have obtained the packages from a source other than the defendant. The direct testimony concerning the placement of the packages by the defendant and their retrieval by the informant served to do just what the defendant claims is lacking.

We have considered the additional contention of the defendant that he was denied a fair trial because of interference by the prosecutor in the course of defendant's cross examination of the informant and by the introduction of prejudicial testimony which could not be connected up to the defendant. We find the contention devoid of merit. The trial was before the court without a jury. The testimony complained of was stricken by the

court. We see nothing in the incident on cross examination which could have operated to the prejudice of the defendant and do not regard it as meriting detailed discussion.

The judgment order of the District Court is affirmed.

AFFIRMED.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 1021

HANEY MIMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After trial without a jury before the United States District Court for the Northern District of Illinois, petitioner was convicted on six counts of a seven-count indictment charging the unlawful sale of narcotics in violation of 26 U.S.C. 4705(a) and 21 U.S.C. 174. Petitioner was sentenced as a second offender to imprisonment for ten years (App. 19-20, 141-142).[1] The court of appeals affirmed.

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[1] References are to petitioner's appendix before the court of appeals which has been filed as a part of the record with this Court.

The evidence may be summarized as follows:

On three separate occasions, September 12, 16, and 26, 1963, petitioner met with an informant, Joseph Branch, and sold heroin to him. The preliminary arrangements and the actual transactions were observed at all pertinent times by federal agents, and on two occasions by a Chicago police officer. These three sales constituted the basis for the first six counts of the indictment.

The procedure followed was substantially the same for all three transactions, and was established by the testimony of Branch, the federal agents involved, and the Chicago police officer. On each occasion, Branch made a telephone call to petitioner from the offices of the Federal Narcotics Bureau in Chicago, and requested a meeting with petitioner (App. 26-30, 72, 74, 85, 119, 124, 126-127). After each rendezvous had been thus arranged, federal agents first searched Branch and determined that he did not possess any narcotics or money (except a small amount of silver), and then provided him with government funds to use in the impending transaction (App. 27-30, 72, 74, 86-87, 119, 124, 126-127). The federal agents, assisted by the Chicago policer officer working with them on special assignment, then surveilled the designated rendezvous point after escorting Branch to the area, and they kept him in view at all times (App. 27-30, 63-65, 72, 74, 87, 119-120, 124, 127, 95-98). On September 12 and 16, the dates of the first two transactions, surveillance was also maintained on petitioner's residence, and his movements to and from the rendezvous point were observed (App. 94-99).

Branch testified at the trial that he had purchased the narcotics on each of the three occasions, and his testimony was corroborated by that of the agents. The chain of custody of the packages, their condition, and the analysis by a government chemist which revealed the contents to be heroin was stipulated and is not contested (App. 137).[2]

There is no merit whatever to petitioner's claim that the evidence was insufficient to sustain his conviction. The verdict was based on the eyewitness testimony of the government informant, which was corroborated by the testimony of the surveilling agents and other law enforcement officers who searched the informant and drove him to the rendezvous. Petitioner's reliance on *Panci* v. *United States*, 256 F. 2d 308 (C.A. 5) is misplaced. In that case the purchaser of the narcotics did not testify, and the government's evidence consisted entirely of the testimony of surveilling agents and extrajudicial declarations by the purchaser. In *Panci*, as in *Gutierrez* v. *United States*, 314 F. 2d 334 (C.A. 5)—which also involved an alleged narcotics transaction observed by government agents—the critical evidence consisted of hearsay. The

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[2] On December 2, 1963, incident to petitioner's arrest at his home, federal agents searched the trash cans in back of his apartment house and discovered a package there that contained traces of heroin (App. 99, 106, 116-117). On motion of the defense, the district judge struck all of the testimony relating to the search and its fruit, and refused to admit the pertinent exhibit into evidence (App. 137-138). Count seven of the indictment was based on the stricken testimony and the excluded exhibit (App. 7-8).

credibility of the informant in this case was, of course, an issue for the trier of fact, and it was resolved against the petitioner.

Petitioner's contention that he was mistakenly found guilty under count seven of the indictment presents no issue for this Court. At most, the record reflects a clerical error. The government conceded in the court of appeals that the verdict applied only to the first six counts of the indictment since the district court had excluded the evidence relating to the seventh count. Petitioner's remedy, if he wants the verdict corrected, is by motion to correct a clerical mistake under Rule 36, Federal Rules of Criminal Procedure. In any event, the sentence imposed does not exceed that prescribed for any one count of the indictment. Since the evidence is sufficient to support a conviction on the other counts, the conviction must be affirmed. *Lawn* v. *United States*, 355 U.S. 339, 359; *Sinclair* v. *United States*, 279 U.S. 263, 299; *Abrams* v. *United States*, 250 U.S. 616, 619; *United States* v. *Cephas*, 263 F. 2d 518, 519 (C.A. 7).

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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